IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1976

NO. 77-1744

Robert B. Machen,

Petitioner,

vs.

James H. Patterson,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Robert B. Machen, respectfully prays for a Writ of Certiorari issue to review the opinion and judgment to the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 4, 1977.

Opinions Below

Fourth Circuit: The opinions of the United States Court of Appeals for the Fourth Circuit (*Robert B. Machen v. James H. Patterson*, No. 76-2113 and No. 76-2114) unpublished, are set forth in Appendix A. Request for Stay of Mandate to request Writ of Certiorari denied (Appendix A).

District Court: The memorandum and order of dismissal of the United States District Court for the Eastern District of Virginia, Alexandria Division, CA 75-857-A, is shown as Appendix B. The memorandum and order of dismissal of the United States District Court for the Eastern District of Virginia, Alexandria Division, CA 76-345-A, is shown as Appendix C.

Jurisdiction

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered May 4, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and the First, Fourth, and Ninth Amendments to the United States Constitution.

The jurisdiction below is under 28 U.S.C.A. 1332, 1333, 3443; 42 U.S.C.A. 1983; 5 U.S.C.A. 552(a); and alleged violations of constitutionally protected rights.

Questions Presented

Did the Fourth Circuit Court of Appeals err in affirming the dismissal order of the U.S. District Court when the dismissal order so far departed from the accepted and usual course of judicial proceedings and rulings of the Supreme Court in application of Rule 56 of the Federal Rules of Civil Procedure so as to require United States Supreme Court supervision?

Did the Fourth Circuit Court of Appeals err in affirming the U.S. District Court's order of dismissal that far departed from the accepted and usual course of judicial proceedings and sanctioning such a departure by a district court so as to call for an exercise of the Supreme Court's power of supervision? Notwithstanding the judicially approved doctrine that all material in opposition to a Motion for Summary Judgment must be

viewed in light most favorable to the opposing party and that all supporting affidavits of the movant are to be carefully scrutinized, the order of dismissal ignored the original document signed by the defendant. That document not only libeled plaintiff but volunteered on three occasions that no requirement existed for defendant to publish the document or to make any comment; yet the District Court ruled and the Appeals Court affirmed that plaintiff's claim that no requirement existed for defendant to write the document was not supported by the record. Additionally, the plaintiff and four witnesses for the plaintiff who were in an official position with first-hand knowledge made affidavits that contradicted the claim of the defendant that he was required to write the December 11, 1974, memorandum. In addition to the original statement of the defendant that no requirement existed for him to publish the December 11, 1974, memorandum and also the affidavits of plaintiff and witnesses for plaintiff, other certified official documentation

was entered to refute the affidavit of the defendant that was made a year later and after the lawsuit was instituted. Defendant only inferred in his affidavit that a requirement existed for him to publish the December 11, 1974, memorandum. Despite a preponderance of the evidence that showed that genuine issues of material fact were present, why did the District Court disregard and the Appeals Court affirm the departure from the accepted and usual course of judicial proceedings to the extent that supervision of the Supreme Court is required for justice to prevail?

Did the Fourth Circuit Court of Appeals err in affirming the order of dismissal by the U.S. District Court when the order of dismissal was in direct conflict with the previous ruling of the Ninth, Second, and District of Columbia Circuit Courts of Appeals, controlling rulings of the United States Supreme Court and in direct conflict with the judicially approved doctrine of the United States Supreme Court requiring that when officials act "outside the

sphere of legislative activity," they enjoy no special immunity from the local laws protecting the good name and reputation of the ordinary citizen?

Did the Fourth Circuit Court of Appeals err in affirming the order of dismissal of the U.S. District Court when the order of dismissal was in conflict with the discretionary function test required by the Ninth, Second, and District of Columbia Circuit Courts of Appeals before granting immunity to a federal official under claim of immunity citing *Barr v. Matteo*, 360 US 564 (1959)?

Did the Fourth Circuit Court of Appeals err in affirming the order of dismissal by the U.S. District Court when the order of dismissal (CA 76-345-A; Appeal 76-2114) conflicted with the constitutionally protected right of privacy and security against unreasonable search and seizure guaranteed by the First, Fourth, and Ninth Amendments to the United States Constitution, 5 U.S.C. 552(a) and governing Army regulations (AR 623-105) and memoranda (HQ DA Memo 340-4) protecting the right of privacy

of the plaintiff and prohibiting the acts of the defendant?

CONSTITUTIONAL PROVISIONS, STATUTES, DEPARTMENT REGULATIONS, AND MEMORANDA INVOLVED

First Amendment: "Congress shall make no law respecting...or abridging the freedom...and to petition the government for a redress of grievances."

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

Ninth Amendment: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Statutes

Public Law 93-579, Sec. 2(a) "The Contress finds that...(4) the right to privacy is a personal and fundamental right protected by the constitution of the United States; and...5 U.S.C.A. 552a ...(b) Conditions of disclosure--no agency shall disclose any record which

is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless disclosure of the record would be...(7) to another agency or to an instrumentality of any governmental jurisdiction within the control of the United States...and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought...(i)(1) criminal penalties...(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirement...shall be guilty of a misdemeanor..."

Army Regulation 623-105, Paragraph 1-3e : "Under no circumstances will military personnel officers or rating officials retain copies of officers evaluation reports..."

Headquarters, Department of the Army Memorandum No. 340-4, Section 2:

"Policy. (a) It is the policy of the Department of the Army to safeguard the right to privacy of its present and former members...Section 3. Responsibilities. (d) Heads of agencies and offices will assure that all personnel... comply fully with the spirit and letter of this memorandum to preclude abuse of the individual's right to privacy. They will insure that: (1) the contents of the Officer's Military Personnel File are not revealed to unauthorized persons..."

STATEMENT OF THE CASES

On December 10, 1975, a complaint was filed in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. The complaint alleged that the defendant, James H. Patterson, had maliciously prepared, signed, and published a memorandum concerning the plaintiff, Robert B. Machen, which contained false and defamatory matter that asserted lack of maturity, lack of judgment, lack of professional competence and by innuendo lack of

capability to perform in plaintiff's profession and occupation. The complaint also alleged that defendant had without proper authority and in violation of plaintiff's constitutional rights gained access to and divulged the contents of the Official Military Personnel files of the plaintiff. Defendant later admitted by affidavit to having gained access to the records and to having divulged the contents of the records. Defendant, however, made an unsubstantiated claim that he had been authorized access to the official files of plaintiff. The interrogatories propounded to those responsible for protecting the official files, asking who authorized access, were still unanswered when the District Court published its memorandum and order of dismissal. Defendant also claimed that the memorandum was written as an official act.

The complaint had resulted from earlier action wherein during a ninety-day trial assignment period, much consternation arose between plaintiff and defendant concerning, among other things,

certain derogatory statements that defendant made about plaintiff's background and previous employers. During mid-August, 1974, after approximately sixty days had elapsed and before the full trial assignment period elapsed, plaintiff submitted a request for transfer according to the procedures required by departmental regulations. No direct action was taken on the request for transfer by anyone who was alleged to be in the chain of supervision, although a temporary reassignment was effected on or near the date the request for transfer was submitted. Later, when plaintiff returned to the same office, an inquiry was made as to the disposition of the earlier request for permanent transfer that was thought to have been submitted through the proper chain of supervision. That inquiry brought on what was later to be four very severe retaliatory encounters by defendant that resulted in defendant's making threats of career destruction to plaintiff. The threats and other statements that were made were directed toward intimidating plaintiff enough so that pursuit of a

transfer would be out of the question. Following the four abusive and retaliatory meetings during a two-month period, plaintiff, risking the wrath of defendant, sought assistance from the personnel officer to get a transfer. The personnel officer approved the transfer but required a detailed explanation as to the reason a third transfer was originating from the office of the defendant within a year. The personnel officer related that defendant's irrational behavior had not only drove employees from the office but prevented others on the Army staff from voluntarily filling the vacancies that had existed in that office for over nine months. Apparently the personnel officer brought these irregularities to the attention of the principal deputy to Chief of Research, Development and Acquisition, Headquarters Department of the Army. In any event, the defendant again brought plaintiff into defendant's office on December 11, 1974, and defendant, during a two and one-half hour period, promised, among other things, to "just barely kill" plaintiff for plaintiff's role in seeking

redress through the personnel officer. Following that outburst by the defendant, he was observed to write a lengthy document.

During March of 1975 a "Freedom of Information Request" asked for any information that had been published pertaining to plaintiff and his association with defendant that could further impact on plaintiff's professional status and career. The response to the Freedom of Information Act Request provided by the Secretary of the Army contained, among other things, the December 11, 1974, memorandum. That memorandum revealed for the first time all that had been fabricated about plaintiff. Defendant, according to his own written word, voluntarily published a memorandum that contained alleged libelous statements and alleging lack of mental capacity not involving insanity and certain job inefficiencies that brought into question plaintiff's capability to perform professionally. Defendant blatantly ignored the fact that repeated requests for transfer had been offered before defendant's

publication of the December 11, 1974, memorandum. It was obvious that defendant wanted the General Officer to think that any fault for not "getting along" would rest with plaintiff and not with defendant. The December 11, 1974, memorandum published by the defendant contained three caveats on the face of the document that showed that the memorandum was not required but was *published voluntarily*.

The December 11, 1974, memorandum containing false, libelous information voluntarily published by the defendant in retaliation for plaintiff's seeking redress from defendant's irrational behavior is the subject of lawsuit CA 75-857-A (Appeals Court No. 76-2113). Defendant claimed immunity following the initiation of the lawsuit, despite the fact that the December 11, 1974, memorandum was published in violation of departmental regulations that prohibited the publication of such documents.

Following the controversial reassignment of plaintiff on December 12, 1974, the personnel officer finally decided

that an evaluation report could be rendered on plaintiff. Over the objections of plaintiff and approximately two months past the reassignment of plaintiff, and despite the fact that no rating scheme had ever been published denoting the chain of supervision and that Army Regulation 623-105 prohibited a retroactive publication, an official Officer Evaluation Report, DA Form 67-7, was filled out on plaintiff and signed by the defendant on January 29, 1974. Following the publication of the rater section, plaintiff was shown the original evaluation form and objected to certain statements contained in the report but was told to appeal the report through official military channels of communication if removal of the offensive statements was desired. Later, during October 1974, Headquarters Department of the Army, through official military action, removed the offensive statements contained in the report.

During a hearing on April 2, 1976, plaintiff observed that the Assistant United States Attorney, who was repre-

senting the defendant, had spread before him a copy of the original officer evaluation report that did not show the results of the official action that had been taken by Headquarters Department of the Army. That original evaluation was for "Official Use Only" and, according to Army regulations and memoranda, was not to be copied, retained, or divulged except under the most stringently controlled circumstances. Since evaluations are personal papers that are protected by the Fourth Amendment from unreasonable seizure, by Army Regulation 623-105 which prohibits retention and disclosure, by Headquarters Department of the Army Memorandum 340-4 and the Privacy Act 5 U.S.C.A. 552(a), plaintiff objected strenuously to the Assistant U.S. Attorney's having possession of a copy of the original unmodified private report. The Assistant U.S. Attorney tried unsuccessfully to argue that the report had been filed with the complaint but, that argument being unsuccessful, he admitted that the report had been provided to him by the defendant. The defendant

later admitted by affidavit that he had retained a copy of the private report pertaining to plaintiff for "his own use." Defendant also admitted to having divulged the private report upon the alleged advice of counsel. Contrary to the claim of the government in defense of the defendant, an official copy of the report was never provided and could not be provided in the form divulged since the official version of the form had earlier been officially purged of all derogatory remarks. The defendant was caught in his tort and by his malicious actions had again published libelous statements through his admitted retention and disclosure of the constitutionally, statutorily, and regulatorily protected private report that had been illegally retained and divulged. Lawsuit CA 76-345-A (Appeals Court No. 76-2114) resulted from the actions of the defendant. Both of the above actions resulted from defendant's retaliation against plaintiff for exercising his First Amendment right of petitioning for redress of grievance.

Reasons for Granting the Writ

In CA 75-857-A (Appeals No. 76-2113) the District Court far departed from accepted judicial procedures and the Appeals Court affirmed the departure when the Court failed to apply the burden of establishing the nonexistence of any genuine issue of fact by the moving party. The cited authorities and evidence shown herein will document the far departure from accepted judicial procedures by the District and Appeals Courts. In *Walling v. Fairmont Creamery Co.*, 139 F2d 318 (CA 8 Neb 1943); *Sprague v. Vogt*, 150 F2d 795 (CA 8 Minn 1945); *Parmelee v. Chicago Eye Shield Co.*, 157 F2d 582 (CA 8 Mo 1946); *Gonzales v. Tuttman*, 59 F.Supp. 858 (DC NY 1945); *Wittlin v. Giacalone*, 81 App DC 20, 154 F2d 20 (1946); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F2d 425 (CA 6 Ohio 1962); and *Tee Pak Inc. v. St. Regis Paper Co.*, 491 F2d 1193 (CA 6 Ohio 1974), the Courts ruled that all doubts are resolved against the movant and his supporting affidavits and depositions, if any, are to be carefully

scrutinized and those of opponents are to be indulgently treated by the Court. In *United States v. Diebold, Inc.*, 369 US 654, 655 (1962), the Supreme Court ruled that the respondent as moving party had the requirement of showing the absence of a genuine issue as to any material fact and for these purposes the material lodged must be viewed in light most favorable to opposing party. The affidavits in the instant case upon which the defendant relied were not carefully scrutinized as required by Rule 56(c), Federal Rules of Civil Procedure and the cases cited above. The District Court relied on affidavits that agreed only to what the defendant stated in his affidavit. The affidavit of Richard J. Trainor shows that "I have read the complaint in the above-entitled action and I have read the attached affidavit of Colonel James H. Patterson ....With regard to the attached affidavit of Colonel Patterson, all facts contained therein to the best of my knowledge are accurate."

The affiant did not swear to what

he had knowledge of but simply attested to what was alleged to be true in the defendant's affidavit. The court ruled that affidavits not based "on personal knowledge" are insufficient to support a motion for summary judgment. In *Person v. United States*, 112 F2d 1, cert. denied, 311 US 672 (CA 8 Ark 1940), again one must interpret and surely question what the affiant meant when he stated that "with specific reference to the memorandum and supporting documentation sent by LTC Machen to LTG H. Cooksey in early December 1974, COL Patterson's response was at my request." Contrast this statement with the statement of the defendant in the December 11, 1974, memorandum, "...no requirement yet exists for me to comment on the contents of these memoranda...."

The affidavit of Cooksey that contained the following statement, "I have read the complaint in the above-entitled action and have read the attached affidavit of Colonel Patterson. With regard to the attached affidavit of Colonel Patterson, all acts described in the

affidavit fall within the course of Colonel Patterson's official duties and were taken in his official capacity as a Systems Review and Analysis Group Chief and immediate supervisor of Lieutenant Colonel Robert A. Machen." Since defendant was one of over three hundred fifty employees and according to the affidavits of Durkin, Garner, Waneman, and Klaus, no job description or supervisory rating scheme had been published for defendant's job, Cooksey's statement swearing only to what defendant claimed, and which is refuted by other affidavits based on personal knowledge, does not meet the requirement of Rule 56(e).

Rule 56(e) of Federal Rules of Civil Procedure requires that affidavits state matters personally known to affiant, "shall" therein being mandatory as in *Jameson v. Jameson*, 176 F2d 58 (85 DC 176, 1949). In *Union Ins. Soc. v. William Glucking & Co.*, 353 F2d 946 (CA 2 NY 1965), the court ruled that conclusionary statements and statements not made on personal knowledge do not comply with Rule 56(e) and therefore may not

be considered. In *Green v. Benson*, 271 F.Supp. 90 (DC Pa 1967), affidavit was properly struck under Rule 56 where affiant only related to knowledge of other person and not his own.

To show further that careful scrutiny was not given in the court below, the following quotations from affidavits supporting the opposition to summary judgment are shown:

(1) Durkin: "During the period 10 June 1974 through 12 December 1974 no official supervisory scheme existed that could be applied to Robert B. Machen, Lieutenant Colonel, United States Army."

(2) Garner: "The Systems Review and Analysis Office did not have a published rating scheme for the period 20 May 1974 through 13 February 1975...No supervisory rating scheme was published that included Robert B. Machen during the time 10 June 1974 through 12 December 1974."

(3) Klaus: "During the period 10 June 1974 through 15 December 1974 the records of Robert B. Machen, Lieutenant Colonel United States Army, were maintained by this office...During

the period June 1974 through December 1974, I made numerous inquiries to the personnel office, Chief of Research, Development and Acquisition with regard to the lack of an assignment schedule and chain of command or supervisory rating scheme for the officers assigned to the Office of the Chief of Research, Development and Acquisition...Army Regulation 623-105 prohibits the retroactive publication of a supervisory scheme upon which evaluation can be made...Lieutenant Colonel Machen did not have an official supervisory rating chain established during his assignment to the Systems Review and Analysis Office, Office Chief of Research, Development and Acquisitions...."

According to the affidavit of Waneman, Cooksey was not in the chain of supervision, as Cooksey, at the time in question, *was not the Chief of Research, Development and Acquisition and, as such, was not in the line of supervision.* The affidavits of Durkin, Garner, Klaus, and Waneman prove that the affidavit of Cooksey swears only to what the defendant claims

and not to facts based on personal knowledge. The use of the affidavits of defendant, Trainor, and Cooksey does not meet the accepted judicial procedure as outlined in the cases cited. The affidavits of plaintiff, Durkin, Garner, Klaus, and Waneman were also disregarded by the District Court and affirmed by the Appeals Court contrary to the rulings in *Saunders v. Sumner*, 366 F.Supp. 217 (DC Va 1973). Statements in affidavit submitted by defendant were of no effect when the affiant stated "to his knowledge" allegations were not true. Further, where matters contained in supporting affidavits are opinions or legal conclusions, they are ineffectual and are not given any weight whatsoever in summary judgment motions according to the ruling in *G. D. Searle & Co. v. Chas. Pfizer Co.*, 231 F2d 316 (CA 7 Ill 1956).

The affidavits of plaintiff and of Durkin, Garner, Klaus, and Waneman did swear to personally known facts and those known facts contradict the

affidavits of the movant and those by Trainor and Cooksey. In the case of *Hopewell Township Citizens 195 Committee v. Volep*, 482 F2d 376 (CA 3 NJ 1973), the court ruled that the District Court improperly granted summary judgment where opposing affidavits appeared to conflict, since any doubt must be resolved against the moving party and in favor of the party opposing summary judgment even while it might turn out that one witness was right and the other wrong, or that affidavits could be reconciled, this could not be done in the context of summary judgment.

Further, the defense of the defendant bottomed out on an affidavit that was made by the defendant who merely denied the allegations made by plaintiff. In *United States ex rel. Ryan v. Broderick*, 59 F.Supp. 189, appeal dismissed, 150 F2d 1023 (CA 10 Kansas), the court ruled that an affidavit by defendant in which he merely denies the allegation which makes him libel if true cannot support his motion for summary judgment.

Defendant's affidavit, made approximately one year after the memorandum and after the lawsuit was filed, is totally void of any statement that claims that he was requested, directed, or ordered to write the December 11, 1974, memorandum. Defendant, in fact, alleges in his affidavit that "I wrote the December 11, 1974, memorandum to Major General Cooksey in good faith and without any feelings of malice, ill will or retribution toward Lieutenant Colonel Machen. I attempted to clarify the situation with Lieutenant Colonel Machen in an effort to be responsive to Mr. Trainor and Major General Cooksey in their deliberations as to what action Lieutenant Colonel Machen's memorandum required. I did not intend to defame Lieutenant Colonel Machen in any manner." Contrast this docile statement with those in the December 11, 1974, memorandum wherein defendant is quoted to say, "I do not at this time intend to offer specific comments on the individual circumstances cited in the 4 December 1974 and 30 November 1974 memoranda...if

desired or required, I am prepared...to definitively support my comments..." These contradictory comments cannot stand careful court scrutiny as required by the accepted judicial procedures as outlined in the cases cited.

It is clear from the record provided to the courts below and from the cases cited that the Appeals Court sanctioned a far departure from the accepted judicial proceedings and so far sanctioned such a departure by the lower court as to call for an exercise of this Court's supervision as in the case of *Adickes v. Kress & Co.*, 389 US 144, wherein the respondent did not carry out its burden as the party moving for summary judgment of showing the absence as to any material fact and failure to meet that burden requires reversal.

The Fourth Circuit Court of Appeals' affirmation of the District Court's Order is in direct conflict with the rulings of the Ninth, Second, and District of Columbia Courts of Appeals' decisions.

In *Green v. James*, 473 F2d 660 (9th Cir 1973), the court ruled that a federal

official enjoys immunity only in those instances where he acted within the outer perimeter of official duties and was performing a discretionary, as opposed to a ministerial, act. The court found that James, an Army officer, used Army Regulations and Field Manuals containing a detailed list of duties for an Adjutant General; nothing in his three-page list of duties even suggested the particular duty claimed by defendant. The court further found that the absence of the duty claimed in such a detailed list implied that James' alleged acts were outside the scope of his authority. The court went on to say that, even should James show that his acts were within the scope of his authority, he must also prove that he was performing "discretionary acts" at those levels of government where the concept of duty encompasses the sound exercise of authority.

In *Doe v. McMillan*, 412 US 306 (1973), the Supreme Court stated that in the Barr case the court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same

for all officials for all purposes. In *Board of Regents of State Colleges v. Roth*, 408 US 564) 1972), and in *Wisconsin v. Constantineau*, 400 US 433, the court advised caution where the person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him in application of official immunity. The Supreme Court in *Doe v. McMillan* (supra) also ruled that when government officers act "outside the legitimate legislative activity," they enjoy no special immunity from local laws protecting the good name and reputation of the ordinary citizen; see *Tenney v. Bandlowe*, 341 US 376. The Second Circuit Court of Appeals also held in *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F2d 1339 (2d Cir 1972), affirmed in 403 US 388, 91 SCt 1999, that federal officers are immune only if they were acting within the outer scope of their authority and if their duties are discretionary.

The D.C. Circuit in 1971 had ruled in *Carter v. Carlson*, 47 F2d 358, that the sound exercise of discretion was

required before immunity could be granted federal officials. In each circuit the court held that the officers were not immune from money damages and in *Doe v. McMillan*, supra, the court held that official immunity does not automatically attach to any conduct expressly or impliedly authorized by law unless the official was exercising a discretionary function. The court further indicated that, when an official acting in a non-discretionary capacity claims immunity, the Supreme Court "has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to the individual citizen," (*Doe v. McMillan*, 412 US 306 at 320).

The District Court ruled and the Fourth Circuit affirmed the dismissal of the instant case in direct conflict with the decisions of the Ninth Circuit (*Green v. James*, supra), the Second Circuit (*Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, supra), the District of Columbia Circuit (*Carter*

v. Carlson, supra), and the decision of the United States Supreme Court decision documented in *Doe v. McMillan*, supra, and *Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, supra.

The record here is void of any listing of official duties that would indicate the scope of work required of defendant. Conversely, the record does show in the affidavit of Cathleen R. Durkin, sworn from her own knowledge, that "Army Regulation 623-105 prescribes the exact procedure for rendering an evaluation on an officer on active duty in the Army. In no case do the evaluation procedures outlined by the said regulation allow a Department of Defense official the authority, liberty, or discretion to request or render an unstructured letter as an evaluation on an officer." Army Regulation 623-105, paragraph 1-5k, states "Reports will not be submitted unless specifically authorized by this regulation, or otherwise directed by Military Personnel Center." The affidavit of Durkin and the

regulatory prohibition against publication of the memorandum, coupled with the direct conflicts with the rulings of the Ninth, Second, and District of Columbia Courts of Appeal and the United States Supreme Court decisions on the same matter begs for certiorari based upon the requirements that a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter and conflicts with applicable decisions of the United States Supreme Court.

In CA 76-345-A (Appeal 76-2114), the District Court ordered and the Appeals Court affirmed that "the OER (Officer Evaluation Report) complained of was relevant to the defense of the claimed libel in Civil Action No. 75-857-A and must be accorded the absolute privilege applied to communications between attorney and client and to documents given by the client to his counsel for use as an exhibit in judicial proceedings..." The District Court cited para. 237, 50 Am. Jur. as authority.

Defendant (the rater) admitted by affidavit to having kept a copy of the January 29, 1975, Officer Evaluation Report for "his own use." Army Regulation 623-105, para. 1-3e, states "Under no circumstances will military personnel officers or rating officials retain copies of Officer Evaluation Reports..." and the Fourth Amendment states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

In *Murray v. Vaughn*, 300 F.Supp. 688, the court ruled that federal officers are not immune from suit where they exceed their authority and violate the constitution. In *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics* (supra) the court ruled that a citizen who sustains damage as a result of federal agents' violation of the Fourth Amendment is not limited to action in tort, under state law, in state courts, to obtain money damages for invasion of Fourth Amendment rights and damages may be obtained for injuries consequent upon a violation of

the Fourth Amendment by federal officials.

In *U.S. v. Ortiz*, 422 US 891, the court reaffirmed that the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials.

The Supreme Court ruled in *Doe v. McMillan*, 93 S.Ct. 2018, 412 US 306) that republication of a libel in circumstances where the initial publication is privileged is generally unprotected.

In *Cardwell v. Lewis*, 94 S.Ct. 2464, 417 US 583, the Supreme Court again held that "The decisions of this court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusion into his privacy."

In *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357 (D Mass 1950), the court ruled that *a privilege cannot be claimed for the purpose of committing a crime or tort* and, conversely, if privilege is not claimed at the time, it will be considered waived by implication. The court refuses to be burdened

by belated claims of privilege.

In *United States v. Osborn*, 409 F.Supp. 406 (1975), citing *United States v. United Shoe Manufacturing Co.*, supra, the court ruled that the attorney-client privilege did not apply where client necessarily contemplated the divulging of information to a third party. Defendant had illegally retained the OER for approximately a year before any lawsuit was initiated. One can necessarily contemplate that he would or had divulged the information to a third party. The affidavit of defendant names two to whom he divulged the information but alleges without proof that both were attorneys. Defendant also states by affidavit that *he gave no instruction as to what to do with the OER when it was released by defendant.* In *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, the court ruled that the mere existence of attorney-client relationship does not raise a presumption of confidentiality and the burden of proof should be on the party asserting the attorney-client privilege.

In *Duplan Corp. v. Deering Milliken, Inc.*, supra, at 1149, the court ruled that *if the document is not privileged in the hands of client, it does not become privileged merely because it is given to an attorney.* The District Court far departed from the accepted judicial procedure in the instant case, and the Appeals Court affirmed the far departure, when it sanctioned the order of the court against the rulings of the courts cited above.

CONCLUSION

The plaintiff was denied the protection of the First, Fourth, and Ninth Amendments; 5 U.S.C.A. 552(a); Army Regulation 623-105; and Headquarters Department of the Army Memorandum 340-4 before the courts below, as they overlooked substantial evidence and misapprehended the true facts as follows:

THE COURTS BELOW FAILED TO TAKE NOTE THAT:

(a) Defendant stated on three occasions on the face of the document, the

basis of the lawsuit, that no requirement existed for defendant to comment or publish the document.

(b) Defendant's witnesses did not swear to facts based on their own personal knowledge but related only to the claim that defendant's affidavit was accurate and properly descriptive.

(c) Plaintiff's affidavit and affidavits of witnesses for plaintiff swore to facts based on own personal knowledge that contradicted the affidavits of defendant.

(d) Plaintiff's witnesses provided certified documents to validate their affidavits contradicting the claim of defendant and showed that a material issue of fact was present.

(e) The courts below failed to carefully scrutinize the affidavits of defendant and give most favorable light to affidavits of plaintiff in opposition to summary judgment.

(f) The courts below failed to note that the OER had been published before the lawsuit was initiated and illegally retained by defendant.

(g) The courts below failed to note that the OER was not observed during an exchange of exhibits and was never introduced as an exhibit.

(h) The courts below failed to consider that no claim of immunity was requested when the OER was exposed.

(i) The courts below failed to consider that defendant released the OER without instructions and claims not to know what had happened to the OER until the lawsuit was initiated.

The proof for all the points above is documented within the briefs and appendix from the courts below. The most relevant proof was overlooked or misapprehended by the Fourth Circuit Court of Appeals. Plaintiff desires a declaration of his right and the rights of those similarly situated who are repressed, intimidated, abused, or destroyed in the name of governmental efficiency while the federal official vents his spleen on a subordinate who has very little, if any, recourse from the hand of the federal officials who may at any time

claim immunity when called to account for misdeeds.

Plaintiff has asked for a harsh remedy but the remedy should be exemplary, for the records of transcript in the courts below show that the district judge admitted that it is not a question of whether or not he did as you have alleged. He has admitted more than you can get from a trial. The government, however, claims that he is immune and that's that. The question is, what kind of justice do we have when a person can do as he pleases, yet laughs in the face of accountability because governmental efficiency is more important than the individual. It has always been my belief that this country will remain as a bedrock for the individual. Government is for the people, of the people, and by the people, and those rules should not be reversed.

To insure that the role of immunity is not stretched too far, petitioner begs this Honorable Court to order the entire record from the courts below and

to examine scrupulously each bit of documentation presented. It will then be evident that plaintiff was denied the most basic protections afforded under departmental memoranda, regulations, statutes, and the constitutional amendments.

FOR THE REASONS STATED ABOVE, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI BE GRANTED.

Dated: July 15, 1977.

ROBERT B. MACHEN,Ed.D
Petitioner

(Pro Se)

(Appendices Follow)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

Robert B. Machen,	)	
Appellant,	)	*No. 76-2113*
v.	)	*and*
James H. Patterson,	)	*No. 76-2114*
Appellee	)	

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

OREN R. LEWIS, Senior District Judge.

Argued April 5, 1977
Decided May 4, 1977

Before WINTER, BUTZNER, and HALL, Circuit Judges.

Robert B. Machen, *pro se*, for Appellant; George P. Williams, Assistant United States Attorney, (William B. Cummings, United States Attorney, on brief) for Appellee.

PER CURIAM:

A review of the record and of the district court's two opinions discloses that the appeal from the orders of the

district court is without merit. Accordingly, both orders are affirmed for the reasons stated by the district court. *Machen v. Patterson*, C/A No. 75-857-A (E.D. Va., June 10, 1976); *Machen v. Patterson*, C/A No. 76-345-A (E.D. Va., June 21, 1976).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed May 25, 1977

Robert B. Machen,	)	
Appellant,	)	*No.* 76-2113
v.	)	*and*
James H. Patterson,	)	*No.* 76-2114
Appellee.	)	

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.

OREN R. LEWIS, District Judge.

Upon consideration of a motion of the appellant, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - By Direction.

/s/ William K. Slate, II
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Robert B. Machen, *Plaintiff,*	)	
v.	)	C/A No. 75-857-A
James H. Patterson, *Defendant*	)	

MEMORANDUM OPINION AND ORDER

Entered June 10, 1976
OREN R. LEWIS, Senior District Judge.

The plaintiff brought this pro se suit for libel against the defendant, seeking special, general and punitive damages in the amount of $1,757,000 plus costs, attorney fees and other relief as may be just and warranted.

The case was heard upon the pleadings, stipulations, exhibits, depositions, interrogatories and live evidence.

The record thus made discloses that both of the parties are members of the United States Army -- Both were assigned

to the Combat Support Systems Group (SRAO), Office of the Deputy Chief of Staff, in Washington. Lt. General Howard Cooksey was the highest ranking officer -- Richard J. Trainor, the civilian Director of SRAO, was next in line -- Colonel James H. Patterson, the Chief of the Combat Group, worked under Trainor -- Lt. Colonel Robert B. Machen was an analyst working under Colonel Patterson.

Difficulties arose between the plaintiff and the defendant over the plaintiff's work, resulting in the plaintiff presenting the defendant with a written request for transfer in mid-August of 1974, addressed to Lt. General Cooksey -- Nothing was done about the request.

The plaintiff's work did not improve and the defendant recommended to Mr Trainor that the plaintiff be transferred to another job in the Department of the Army, outside SRAO, because of his unsatisfactory work problems which stemmed partly from lack of systems analysis and army staff experience. Mr. Trainor so informed the plaintiff on November 12, 1974.

In December of 1974 the plaintiff sent

a written request directly to Lt. General Cooksey for a job change, in which he enclosed numerous memoranda and affidavits pertaining to his observations in re his work relations with the defendant, Mr. Trainor and others. The Lt. General showed the requ-st to Mr. Trainor and asked him to look into the matter and to inform him as to the facts in re the plaintiff's allegations.

Mr. Trainor showed the defendant a copy of the plaintiff's letter. After discussing the matter the defendant suggested that he prepare a reply -- The December 11th memorandum to Lt. General Cooksey, which is the subject matter of this suit, followed. The memorandum was first shown to Mr. Trainor.

The Government claims that the letter in question is "privileged" and that government officials, including military officers, acting within the scope of their authority are free to perform their duties unencumbered by fear of damage suits -- They rely on Barr v. Matteo, 360 U.S. 564 (1959), and Howard v. Lyon,

360 U.S. 593 (1959).

The plaintiff tacitly concedes that it is well settled that acts committed by military officers in the performance of their official duties are absolutely privileged -- He contends, however, that the privilege is not applicable in this case because the Lt. General did not ask for the memorandum -- Colonel Patterson at best was a volunteer -- and that no chain of command had been established for SRAO.

The record does not support the plaintiff's contention.

Colonel Patterson was the chief of the Combat Group -- The plaintiff was an analyst under his supervision -- Mr. Trainor says that the December 11th memorandum was written at his request -- Both Mr. Trainor and Lt. General Cooksey say Colonel Patterson was acting within the scope of his official duties as the immediate supervisor of the plaintiff.

Whether an official chain of command had been established for SRAO is immaterial -- The question is whether Colonel Patterson was acting within the

scope of his authority when the memorandum in question was written.

The Lt. General had a right to get the facts in re the plaintiff's request for a transfer -- Mr. Trainor had a right to discuss the matter with the plaintiff's immediate supervisor -- and Colonel Patterson had the duty of replying.

The Court finds the December 11th memorandum was written by Colonel Patterson in the performance of his official duties.

Therefore this libel suit must be dismissed at the cost of the plaintiff, and

It Is So Ordered.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
United States
Senior Judge

June 10, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Robert B. Machen,	)	
Plaintiff,	)	
v.	)	C/A No. 76-345-A
James H. Patterson,	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Entered June 21, 1976
OREN R. LEWIS, Senior District Judge.

This libel suit was spawned by the libel suit the plaintiff brought against the defendant (C.A. 75-857-A).

During the pretrial court-ordered inspection and exchange of exhibits in that suit, the plaintiff discovered that the assistant United States attorney for the Eastern District of Virginia had a copy of his army officer evaluation report (hereinafter referred to as OER) in his case file -- He says the assistant district attorney told him he had gotten it from Captain Finklea of the Judge

Advocate General Corps who was assisting him in Colonel Patterson's defense.

Lt. Colonel Machen says that Colonel Patterson libeled him again and impaired his military career when he gave Captain Finklea an undeleted[1] copy of his OER.

This libel action followed.

Captain Finklea and one of the assistant district attorneys for this District entered their appearances for the defendant and moved to dismiss or, in the alternative, for summary judgment because the document complained of was given to counsel for thier use in defending Colonel Patterson in the then pending libel action (C.A. 75-857-A).

The facts are not in dispute.

Colonel Patterson admits that he was the rating officer who prepared the OER in question and that he had retained a copy of Lt. Colonel Machen's incomplete officer evaluation report -- He also admits that he gave a copy of this incomplete report to Major Turner and Maj. General Clausen,

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[1]All references to Part IVa-6 as explained in Part IVb were deleted from the report by order of the Secretary of Army.

Staff Judge Advocate, III Corps and Fort Hood, the military attorneys who were assisting him in defending the libel suit Lt. Colonel Machen had filed against him. They had asked him for copies of everything he had pertaining to the libel suit.

Captain Finklea, an action attorney, Military Personnel Branch, Litigation Division of the office of the Judge Advocate General, Department of the Army, admits that he forwarded the OER in question along with several other documents to the United States Attorney for the Eastern District of Virginia to aid in his representation of Colonel Patterson in the said libel suit.

George P. Williams, the assistant United States attorney for this District assigned to represent Colonel Patterson in the premises, admits that he received the OER in question from Captain Finklea and that he put it in his case file among the papers that he intended to use, if necessary, during the trial of the said libel suit.

The plaintiff admits he first saw

his OER in the assistant district attorney's file while inspecting the government exhibits.

The plaintiff brought this suit under 28 U.S.C. § 1332 and the Privacy Act, 5 U.S.C. § 552(a).

He contends that Colonel Patterson's retention and disclosure of his OER violates the provisions of Army Regulations 623-105 and 340-21 and the Privacy Act, 5 U.S.C. § 552(a).

He wants this Court to so declare--and to award him special, general and punitive damages in the amount of $407,000.00, together with a bench order prohibiting the defendant from further disclosing any and all information pertaining to his past association with him.

The plaintiff's request for declaratory judgment should be denied, and

It Is So Ordered.

Violation of army regulations subjects the offender to such punishment as a court-martial may direct. 10 U.S.C. § 892, Art. 92. The Court has no jurisdiction to hear and determine such matters.

The Privacy Act provides for the bringing of civil actions against an agency. 5 U.S.C. § 552(a)(g)(i) -- The agency is not here sued.

Criminal charges may be brought against any officer or employee of an agency who, by virtue of his employment or official position, has possession of or access to agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules and regulations established thereunder, and who, knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any persons or agency not entitled to receive it shall be guilty of a misdemeanor and fined not more than $5,000.00 § 552(a)(i)(1).

Criminal charges must be brought and prosecuted by the United States Attorney -- They are not heard and determined in private civil litigation.

Whether Colonel Patterson is in violation of the army regulations or Privacy Act in retaining and disclosing

the OER in question -- and this Court does not determine that claim -- is not dispositive of his claim of absolute privilege.

Neither need it now be determined whether the claimed § 552(a)(b)(3) exemption is applicable -- The OER in question was not gotten from the plaintiff's army records -- The incomplete OER complained of was a copy of the copy retained by Colonel Patterson -- He gave it to his defense counsel in the original libel suit -- They asked him for all information and documents concerning that case. It is well settled that communications between attorney and client are privileged. See 50 AmJr. 2d Libel and Slander 212.

Further, the incomplete copy of the plaintiff's OER was discovered in the defendant's attorney's case file during the court-ordered pretrial inspection and exchange of documentary evidence.

Defamatory matter published in a judicial proceeding is absolutely privileged if it has some relation to the proceeding even though it is remote, and

regardless of whether or not it is sufficient to obtain the relief sought. See para. 236, 50 AmJur. 2d, supra.

> "The rule according absolute privilege to judicial proceedings has been applied to a wide variety of proceedings...It may be here noted that the defense of absolute privilege is available with respect to relevant statements made in pretrial and in discovery proceedings. para. 237.

The plaintiff's claim that the question of the relevancy of the OER in Civil Action No. 75-857-A is a genuine issue for trial is misplaced -- Relevancy is a question for the court, not for the jury. The courts are very liberal in determining questions of relevancy and hold to be privileged any statement that possibly may be pertinent -- The defense of privilege is held to be unavailable only if the statement is so palpably irrelevant to the subject matter of controversy that no reasonable man can doubt its relevancy or materiality. See para 237, 50 AmJr. 2d, supra.

The OER here complained of was relevant to the defense of the claimed libel in Civil Action No. 75-857-A and must be accorded the absolute privilege applied to communications between attorney and client and to documents given by the client to his counsel for use as an exhibit in judicial proceedings, and

It Is So Ordered.

The plaintiff's request for a bench order prohibiting the defendant from disclosing his past association with him would not only deny the defendant the right to discuss his defenses with his counsel, it would deny him the right of free speech.

Therefore the prayed for injunction should be denied, and

It Is So Ordered.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
United States
June 21, 1976 Senior Judge

No. 77-174

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT B. MACHEN, PETITIONER

v.

JAMES H. PATTERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-174

ROBERT B. MACHEN, PETITIONER

v.

JAMES H. PATTERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner, an officer in the United States Army, seeks review of the court of appeals' affirmance of the dismissal of two different libel actions that he brought against respondent, his immediate supervisor.

1. The facts of both cases are set forth in the district court's opinions (Pet. Apps. B and C 4-16). Difficulties arose between the petitioner, a Lieutenant Colonel, and his supervisor, respondent Colonel (now General) Patterson, over petitioner's work at the Systems Review and Analysis Office, Office of the Deputy Chief of Staff, Department of the Army. As a result, petitioner requested a transfer and respondent recommended that the petitioner be transferred. Nothing was done about the requests.

Petitioner then sent a written request for transfer to Lieutenant General Cooksey, the highest ranking officer at the Systems Review and Analysis Office. Petitioner enclosed with his request numerous memoranda and affidavits concerning the respondent and others. General Cooksey showed the materials to respondent's immediate supervisor, Richard J. Trainor, and asked him to investigate the matter. Trainor discussed the request and related documents with respondent and solicited his comments. Respondent suggested that he could best comply with the request by writing a memorandum assessing the petitioner's allegations and performance of duty. Respondent submitted his memorandum for General Cooksey to Trainor.

Petitioner instituted a suit against respondent (Civil Action No. 75-857-A), claiming that statements in the memorandum were libelous. On respondent's motion for summary judgment, the district court ruled that respondent was acting within the scope of his duties in making his statements and, relying on *Barr* v. *Matteo*, 360 U.S. 564, held that respondent therefore had absolute immunity from the libel suit (Pet. App. 4-8). Accordingly, the district court dismissed the complaint (Pet. App. 8).

In a second law suit (Civil No. 76-345-A), petitioner again alleged that respondent had libeled him, this time by providing a copy of petitioner's army officer evaluation report to the member of the Judge Advocate General's Office who was assisting the United States Attorney's Office in respondent's defense of the first suit. The district court granted respondent's motion to dismiss or, alternatively, for summary judgment, holding that the report "must be accorded the absolute privilege applied to communications between attorney and client and to documents given by the client to his counsel for use as an exhibit in judicial proceedings" (Pet. App. 16).

The cases were consolidated on appeal and the court of appeals affirmed for the reasons the district court gave. The court of appeals stated that "[a] review of the record and of the district court's two opinions discloses that the appeal * * * is without merit" (Pet. App. 1-2).

2. The dismissal of the two libel actions was correct.

a. With respect to the first libel action, which arose out of respondent's appraisal of petitioner's performance and the subsequent reporting of that appraisal to his superiors, the lower courts correctly held that respondent has absolute immunity. *Barr* v. *Matteo, supra*. Respondent's actions were well within the scope of his duty[1] and involved "an appropriate exercise of * * * discretion."

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[1]Petitioner contends (Pet. 18-27) that summary judgment was improper on the question whether respondent was acting within the scope of his authority when he prepared his memorandum. On this point, the district court correctly found (Pet. App. 7-8) that

> [Respondent] was the chief of the Combat Group—The plaintiff was an analyst under his supervision—Mr. Trainor says that the December 11th memorandum was written at his request—Both Mr. Trainor and Lt. General Cooksey say [respondent] was acting within the scope of his official duties as immediate supervisor of the plaintiff.
>
> * * * * *
>
> The Lt. General had a right to get the facts in re the plaintiff's request for a transfer—Mr. Trainor had a right to discuss the matter with the plaintiff's immediate supervisor—and [respondent] had the duty of replying.

Petitioner's argument is based on his objection to the use of the affidavits of General Cooksey and Trainor. Contrary to petitioner's assertions, however, each of the affiants swore to information within his personal knowledge. Trainor was respondent's immediate supervisor and General Cooksey was Trainor's immediate superior. Each had personal knowledge of respondent's duties and responsibilities. The affidavits thus constitute sufficient evidence that respondent acted within the scope of his authority.

Barr v. *Matteo, supra*, 360 U.S. at 575. Under these circumstances, the established federal rule is that respondent has absolute immunity from a suit for damages arising from such activity. *Ibid.*;[2] see *Howard* v. *Lyons*, 360 U.S. 593, 597-598.

The Court, however, has granted the petition for a writ of certiorari in *Butz* v. *Economou*, certiorari granted, 429 U.S. 1089, which presents related questions concerning the immunity of federal government officials from damage suits based upon acts done as part of their official duties.[3] In *Economou* the Second Circuit held that such officials have only a qualified, not an absolute, immunity.

Economou, where the claim for damages was based upon the initiation, conduct, and decision of administrative enforcement proceedings, presents the immunity issue in a different context than this case. Nevertheless, in *Economou* the court of appeals questioned the continuing validity of *Barr*. The Court therefore may deem it appropriate to hold this petition pending its disposition of *Economou*. But see *Martinez* v. *Schrock*, 537 F. 2d 765

[2]Notwithstanding subsequent decisions of this Court concerning the immunity available to state officials sued under 42 U.S.C. 1983, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, *Barr* v. *Matteo, supra*, at least stands for the rule that federal government officials charged with alleged libel during their performance of duties are protected from damage suits by absolute immunity. See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, C.A.D.C., No. 74-1899, decided September 16, 1977 (*en banc*). That principle is fully applicable to the case here.

[3]Petitioner is being furnished with a copy of petitioners' brief in *Economou*.

(C.A. 3), certiorari denied, 430 U.S. 920; *Conley* v. *Sawyer, et al.*, 538 F. 2d 323 (C.A. 4), certiorari denied, 429 U.S. 999, 1000.[4]

b. With respect to the second libel action, which arose out of respondent's delivery to his attorney of an evaluation report of petitioner that he had made, the courts below correctly held that the communication was privileged. As the district court explained (Pet. App. 10-12), attorneys assisting respondent in the defense of petitioner's first libel suit against him asked him for copies of all documents that might be relevant, and in response respondent gave them the evaluation report. Such communications between a client and his attorney, relating to actual or intended litigation, are protected under the traditional common law rule of privilege. See Prosser, *Law of Torts*, § 114, pp. 780-781, and § 115, p. 787 (4th ed. 1971); Fleming, *The Law of Torts* 528-530 (3d ed. 1965); 50 Am. Jur. 2d, Libel and Slander, § 212, pp. 723-724.[5]

Petitioner also argues (Pet. 32-36) with respect to the second libel action that respondent possessed the officer evaluation report in violation of Army regulations

[4]The petitions in both *Martinez* and *Conley* raised questions concerning the applicability of absolute immunity, the question in the latter case arising, like the case here, in the context of libel claims. The Court denied the petitions in those cases despite similar suggestions by the government that the issues raised might be interrelated with those raised in *Economou*. There appears to be no reason for treating this case differently.

[5]Petitioner discovered that respondent had delivered the report to his attorney during a court-ordered inspection and exchange of exhibits prior to trial in the first libel case (Pet. App. 9, 14). As the district court ruled (Pet. App. 15-16), this discovery, if considered a separate publication of the report, occurred in the course of a judicial proceeding and thus is covered by the privilege for statements made in that context.

and disclosed it to his attorney in violation of the Privacy Act. The district court did not decide these issues (Pet. App. 14) since, even assuming *arguendo* the correctness of petitioner's charges, they are irrelevant to his libel claim.

As the district court pointed out (Pet. App. 12), "[v]iolation of army regulations subjects the offender to such punishment as a court-martial may direct. 10 U.S.C. § 892, Art. 92. The court has no jurisdiction to hear and determine such matters." If petitioner has any remedy in federal court for the allegedly unlawful disclosure of the report, it is under the Privacy Act (5 U.S.C. (Supp. V) 552a(g)). But petitioner has not pursued that remedy (see Pet. App. 13). Accordingly, the questions concerning alleged violation of Army regulations and the Privacy Act are not properly presented here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

DOJ-1977-09